



JUDICIAL COUNCIL OF CALIFORNIA

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REPORT TO THE JUDICIAL COUNCIL

For business meeting on: May 14–15, 2020

Title

Appellate Procedure: Appointment of Counsel in Misdemeanor Appeals

Agenda Item Type

Action Required

Rules, Forms, Standards, or Statutes Affected

Amend Cal. Rules of Court, rule 8.851;
revise forms CR-131-INFO and CR-133

Effective Date

September 1, 2020

Date of Report

March 9, 2020

Recommended by

Appellate Advisory Committee
Hon. Louis R. Mauro, Chair

Contact

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Executive Summary

To implement the California Supreme Court's decision in *Gardner v. Appellate Division of Superior Court* (2019) 6 Cal.5th 998, the Appellate Advisory Committee recommends amending the rule regarding appointment of counsel in misdemeanor appeals to expand the circumstances under which the appellate division is authorized to appoint counsel for an indigent defendant. The proposal would also revise two forms to be consistent with the rule amendments.

Recommendation

The Appellate Advisory Committee recommends that the Judicial Council, effective September 1, 2020:

1. Amend California Rules of Court, rule 8.851 to require the appellate division to appoint counsel for an indigent defendant who has been charged with a misdemeanor and the appeal qualifies as a critical stage of the criminal process; allow the appellate division to appoint counsel for any other indigent defendant charged with a misdemeanor; add an advisory committee comment describing *Gardner v. Appellate Division of Superior Court* (2019) 6 Cal.5th 998; and make other conforming changes and corrections;
2. Revise form CR-131-INFO to reflect the amendments to rule 8.851 and to clarify language explaining that a misdemeanor defendant does not have a right of self-representation; and

3. Revise form CR-133 to reflect the amendments to rule 8.851.

The text of the amended rule and the revised forms are attached at pages 6–18.

Relevant Previous Council Action

In 1991, the Judicial Council adopted former rule 185.5 regarding appointment of counsel. The rule provided in part: “On application of an indigent defendant-appellant, the appellate department shall appoint counsel on appeal for a defendant convicted of a misdemeanor who is subject to incarceration or a fine of more than \$500 (including penalty and other assessments), or who is likely to suffer significant adverse collateral consequences as a result of the conviction.” (Former Cal. Rules of Court, rule 185.5(a).) In the years since, the rule has been amended and renumbered, but the portion of the rule that is relevant to this proposal has not substantively changed.

Similarly, both of the forms have been revised at various times, but the council has not taken action relevant to this report.

Analysis/Rationale

Currently, rule 8.851 of the California Rules of Court provides for the appointment of counsel on appeal only for convicted defendants. On application, the appellate division must appoint appellate counsel for a defendant convicted of a misdemeanor who was represented by appointed counsel in the trial court or establishes indigency and who either “is subject to incarceration or a fine of more than \$500,” or “is likely to suffer significant adverse collateral consequences as a result of the conviction.” (Cal. Rules of Court, rule 8.851(a)(1).) The appellate division “may appoint counsel for any other indigent defendant convicted of a misdemeanor.” (*Id.*, rule 8.851(a)(2).) The rule does not authorize the appointment of counsel for defendants who have not been convicted.

In *Gardner v. Appellate Division of Superior Court* (2019) 6 Cal.5th 998 (*Gardner*), the Supreme Court addressed the question of whether a defendant facing misdemeanor charges, who filed a successful motion to suppress evidence with the help of court-appointed counsel, was entitled to appointed counsel’s assistance in responding to a pretrial prosecution appeal of the suppression order. The court explained that, under the California Constitution, a criminal defendant’s right to counsel is not limited to trial; rather, it “extends to other, ‘critical’ stages of the criminal process.” (*Gardner*, 6 Cal.5th at p. 1004 (citations omitted).) Further, “critical stages can be understood as those events or proceedings in which the accused is brought in confrontation with the state, where potential substantial prejudice to the accused’s rights inheres in the confrontation, and where counsel’s assistance can help to avoid that prejudice.” (*Id.*, at pp. 1004–1005.) In light of the consequences to the defendant if she lost the appeal and the difficulty of defending a suppression order without the assistance of counsel, the court held that the pretrial prosecution appeal of an order granting the defendant’s motion to suppress evidence was a “critical stage” of the proceedings at which the defendant had a right to appointed counsel as a matter of state constitutional law. (*Id.*, at p. 1005.)

Rule 8.851

To implement the *Gardner* decision, the Appellate Advisory Committee recommends amending rule 8.851(a) to require the appellate division to appoint counsel for defendants charged with a misdemeanor in circumstances that qualify as “critical stages” of the proceedings. A pretrial prosecution appeal of a suppression order is a critical stage for which counsel must be appointed, but, as noted above, the *Gardner* court’s holding was not limited to this one situation.

Accordingly, the recommended rule language is intended to be broad enough to encompass other possible critical stages in the proceedings for a defendant who has been charged with, but not convicted of, a misdemeanor. For clarity and to avoid repetitiveness, the committee has reorganized paragraph (1) of subdivision (a) to include the indigency requirement, kept the provisions regarding defendants convicted of a misdemeanor in subdivision (a)(1)(A), and drafted new language for subdivision (a)(1)(B) regarding defendants charged with a misdemeanor who are entitled to appointed counsel.

The committee also recommends amending rule 8.851(a)(2), which currently allows the appellate division to appoint counsel “for any other indigent defendant convicted of a misdemeanor,” to allow the appellate division, in its discretion, to appoint counsel for any other defendant charged with a misdemeanor. This amendment would maintain the parallel structure of *requiring* the appointment of counsel in certain situations for those charged with *or* convicted of misdemeanors, and *permitting* the appointment of counsel in other situations for those charged with *or* convicted of misdemeanors. A situation warranting the discretionary appointment of appellate counsel for a defendant charged with a misdemeanor would be relatively rare, but authorizing the appellate division to appoint counsel should the circumstances support it is consistent with the Supreme Court’s reasoning in *Gardner* and with the Judicial Council’s goal of improving access to impartial justice.

The rule amendments also include minor conforming changes to other parts of subdivisions (a) and (b) and the existing advisory committee comment, as well as a new advisory committee comment for subdivision (a)(1)(B) to provide information on the *Gardner* decision.

Information on Appeal Procedures for Misdemeanors (form CR-131-INFO)

The committee recommends revisions to this information sheet that conform to the proposed rule amendments. Item 5 (“How do I get a lawyer to represent me?”), which describes the circumstances in which the appellate division is required to appoint counsel, would be revised to include an appeal involving a defendant who has been charged with a misdemeanor and faces potential substantial prejudice (i.e., a *Gardner* situation). A reference to rule 8.851 would also be added to item 5.

Item 6 (“Who can appeal?”) would be revised to clarify that, in some cases, the government agency that filed the criminal charges is the appellant and the party against whom the charges were filed is the respondent.

In addition, the committee recommends revising item 4 (“Do I need a lawyer to appeal?”) to clarify that a defendant does not have a right of self-representation and to add language advising a defendant whose request for self-representation was denied of the need to either hire an attorney or request that an attorney be appointed.

Request for Court-Appointed Lawyer in Misdemeanor Appeal (form CR-133)

The committee recommends a number of changes to this form for requesting a court-appointed lawyer, to be consistent with *Gardner*. Currently, the form is addressed exclusively to an appellant who has filed a notice of appeal, and the instructions refer only to a convicted defendant as eligible for appointed counsel. References to “appellant” and “your notice of appeal” in various places on the form would be replaced with “defendant” and “the notice of appeal.” The instructions would be revised to include defendants in *Gardner* situations by adding the same new language proposed for item 5 on form CR-131-INFO. Current item 4 would be renumbered as item 3f to group together all questions regarding a convicted defendant’s sentence and other negative consequences resulting from the conviction. A new item 4 would be added for defendants who have not been convicted to describe the order being challenged so the appellate division can determine whether the appeal is a “critical stage” of the criminal process under *Gardner*.

Policy implications

The committee has identified no significant policy implications associated with the recommended changes to the rule and forms.

Comments

The proposed amendments to rule 8.851 and revisions to the two forms were circulated for public comment between December 13, 2019, and February 11, 2020, as part of the winter comment cycle. Eight individuals or organizations submitted comments on this proposal. Four commenters agreed with the proposal, two agreed with the proposal if modified, and two did not state a position on the proposal but provided positive comments. A chart with the full text of the comments received and the committee’s responses is attached at pages 19–34.

The committee sought specific comments on whether subdivision (a)(2) of rule 8.851, which allows the appellate division to make a discretionary appointment of counsel “for any other indigent defendant convicted of a misdemeanor,” should be amended to authorize such an appointment for any other defendant *charged with* a misdemeanor. Four commenters responded to this question: three indicated support for this amendment, one recommended against it. For the reasons described above, the committee recommends this amendment.

The committee also requested comments on whether there should be a separate rule regarding appointment of counsel in appellate division writ proceedings. Four commenters responded; all were in favor. The committee will consider developing such a rule as a future project.

In its comments, a bar association suggested adding specific examples of “significant adverse collateral consequences” (rule 8.851(a)(1)(A)) to clarify the information being sought on form

CR-133 in requesting appointment of counsel. The committee recommends clarifying language regarding the different requirements for entitlement to appellate counsel on both forms and the corresponding questions asked on form CR-133, and agrees with the commenter that specific examples would be helpful. The committee has made these modifications to item 5 on the information sheet, and to the instructions and items 3f and 4 on the request form.

Alternatives considered

In the wake of *Gardner*, the rule and forms were no longer correct. Thus, the committee did not consider the alternative of taking no action.

The committee considered narrower language in rule 8.851 to implement *Gardner*, but concluded that the Supreme Court's analysis of the right to counsel was broad enough potentially to include proceedings other than a pretrial prosecution appeal of an order granting a motion to suppress evidence that take place before the trial court issues a final judgment.

The committee also considered a new subdivision (d) of rule 8.851 regarding appointment of counsel for a defendant whose request for self-representation was denied. The committee does not recommend a new subdivision because self-representation on appeal is not sufficiently related to the content of rule 8.851 and would be better addressed, if at all in the rules of court, in a separate rule. The proposed revisions to item 4 on form CR-131-INFO, described above, are intended to clarify that a misdemeanor defendant does not have a right of self-representation on appeal.

Fiscal and Operational Impacts

Based on feedback in the comments, the committee anticipates that impacts on the courts will include some education and training, updates to procedures, and changes to case management systems. The Civil and Appellate Division of the Superior Court of Orange County estimates that 16 hours by a Program Coordinator Specialist over the course of one month will be required to revise procedures, train staff, and implement the changes.

JRS notes there will be cost impacts to the county indigent defense fund and potential issues with implementation and payment since current contracts likely do not address the expected additional appointments. Communication with justice partners will be important.

Attachments and Links

1. Cal. Rules of Court, rule 8.851, at pages 6–7
2. Forms CR-131-INFO and CR-133, at pages 8–18
3. Chart of comments, at pages 19–34

Rule 8.851 of the California Rules of Court would be amended, effective September 1, 2020, to read:

Rule 8.851. Appointment of appellate counsel

(a) Standards for appointment

- (1) On application, the appellate division must appoint appellate counsel for a defendant ~~convicted of a misdemeanor~~ who was represented by appointed counsel in the trial court or establishes indigency and who:
 - (A) Was convicted of a misdemeanor and is subject to incarceration or a fine of more than \$500 (including penalty and other assessments), or who is likely to suffer significant adverse collateral consequences as a result of the conviction; ~~and~~ or
 - (B) ~~Was represented by appointed counsel in the trial court or establishes indigency.~~ Is charged with a misdemeanor and the appeal is a critical stage of the criminal process.
- (2) On application, the appellate division may appoint counsel for any other indigent defendant charged with or convicted of a misdemeanor.
- (3) For applications under (1)(A), a defendant is subject to incarceration or a fine if the incarceration or fine is in a sentence, is a condition of probation, or may be ordered if the defendant violates probation.

(b) Application; duties of trial counsel and clerk

- (1) If defense trial counsel has reason to believe that the client is indigent and will file an appeal or is a party in an appeal described in (a)(1)(B), counsel must prepare and file in the trial court an application to the appellate division for appointment of counsel.
- (2) If the defendant was represented by appointed counsel in the trial court, the application must include trial counsel's declaration to that effect. If the defendant was not represented by appointed counsel in the trial court, the application must include a declaration of indigency in the form required by the Judicial Council.
- (3) Within 15 court days after an application is filed in the trial court, the clerk must send it to the appellate division. A defendant may, however, apply directly to the appellate division for appointment of counsel at any time after ~~filing~~ the notice of appeal is filed.

1
2 (4) The appellate division must grant or deny a defendant's application for
3 appointment of counsel within 30 days after the application is filed.
4

5 (c) * * *

6
7 **Advisory Committee Comment**
8

9 *Request for Court-Appointed Lawyer in Misdemeanor Appeal* (form CR-133) may be used to
10 request that appellate counsel be appointed in a misdemeanor case. If the ~~appellant~~ defendant was
11 not represented by the public defender or other appointed counsel in the trial court, the ~~appellant~~
12 defendant must use *Defendant's Financial Statement on Eligibility for Appointment of Counsel*
13 *and Reimbursement and Record on Appeal at Public Expense* (form ~~MC-210~~ CR-105) to show
14 indigency. These forms are available at any courthouse or county law library or online at
15 www.courts.ca.gov/forms.
16

17 **Subdivision (a)(1)(B).** In *Gardner v. Appellate Division of Superior Court* (2019) 6 Cal.5th 998,
18 the California Supreme Court addressed what constitutes a critical stage of the criminal process.
19 The court provided the analysis for determining whether a defendant has a right to counsel in
20 confrontational proceedings other than trial, and held that the pretrial prosecution appeal of an
21 order granting the defendant's motion to suppress evidence was a critical stage of the process at
22 which the defendant, who was represented by appointed counsel in the trial court, had a right to
23 appointed counsel as a matter of state constitutional law.

1 What does this information sheet cover?

This information sheet tells you about appeals in misdemeanor cases. It is only meant to give you a general idea of the appeal process, so it does not cover everything you may need to know about appeals in misdemeanor cases. To learn more, you should read rules 8.800–8.816 and 8.850–8.890 of the California Rules of Court, which set out the procedures for misdemeanor appeals. You can get these rules at any courthouse or county law library or online at www.courts.ca.gov/rules.

2 What is a misdemeanor?

A misdemeanor is a crime that can be punished by jail time of up to one year, but not by time in state prison. (See Penal Code sections 17 and 19.2. You can get a copy of these laws at <http://leginfo.legislature.ca.gov/faces/codes.xhtml>.) If you were also charged with or convicted of a felony, then your case is a felony case, not a misdemeanor case.

3 What is an appeal?

An appeal is a request to a higher court to review a decision made by a lower court. **In a misdemeanor case, the court hearing the appeal is the appellate division of the superior court and the lower court—called the “trial court” in this information sheet—is the superior court.**

It is important to understand that **an appeal is NOT a new trial**. The appellate division will not consider new evidence, such as the testimony of new witnesses or new exhibits. The appellate division’s job is to review a record of what happened in the trial court and the trial court’s decision to see if certain kinds of legal errors were made in the case:

- **Prejudicial error:** The party that appeals (called the “appellant”) may ask the appellate division to determine if an error was made about either the law or court procedures in the case that caused substantial harm to the appellant (this is called “prejudicial error”). Prejudicial error can include things like errors made by the judge about the law, errors or misconduct by the lawyers, incorrect

For information about appeal procedures in other cases, see:

- *Information on Appeal Procedures for Infractions* (form CR-141-INFO)
- *Information on Appeal Procedures for Limited Civil Cases* (form APP-101-INFO)

You can get these forms at any courthouse or county law library or online at www.courts.ca.gov/forms.

instructions given to the jury, and misconduct by the jury that harmed the appellant. When it conducts its review, the appellate division presumes that the judgment, order, or other decision being appealed is correct. It is the responsibility of the appellant to show the appellate division that an error was made and that the error was harmful.

- **No substantial evidence:** The appellant may also ask the appellate division to determine if there was substantial evidence supporting the judgment, order, or other decision being appealed. When it conducts its review, the appellate division only looks to see if there was evidence that reasonably supports the decision. The appellate division generally will not reconsider the jury’s or trial court’s conclusion about which side had more or stronger evidence or whether witnesses were telling the truth or lying.

The appellate division generally will not overturn the judgment, order, or other decision being appealed unless the record clearly shows that one of these legal errors was made.

4 Do I need a lawyer to appeal?

You will probably need a lawyer. You are **not** allowed to represent yourself in an appeal in a misdemeanor case **unless** the appellate division permits you to do so. But appeals can be complicated, and you would have to follow the same rules that lawyers have to follow. If you have any questions about the appeal procedures, you should talk to a lawyer.

If the appellate division permits you to represent yourself, you must put your address, telephone number,



fax number, and email address (if available) on the cover of every document you file with the court and let the court know if this contact information changes so that the court can contact you if needed.

If the appellate division does not permit you to represent yourself, you must hire a lawyer at your own expense or ask the court to appoint a lawyer to represent you.

5 How do I get a lawyer to represent me?

The court is required to appoint a lawyer to represent you if you are indigent (you cannot afford to pay for a lawyer) and:

- You were convicted and your punishment includes going to jail or paying a fine of more than \$500 (including penalty and other assessments); or
- You are likely to suffer other negative consequences from the conviction (for example, immigration problems or inability to get or keep a license or permit); or
- You have not been convicted but you are likely to suffer significant harm if you lose the appeal.

See rule 8.851 of the California Rules of Court for more information about when the court is required to appoint a lawyer to represent you.

The court may, but is not required to, appoint a lawyer to represent you on appeal in other circumstances if you are indigent. You are automatically considered indigent if you were represented by the public defender or other court-appointed lawyer in the trial court. You will also be considered indigent if you can show that your income and assets are too low to pay for a lawyer.

If you think you are indigent, you can ask the court to appoint a lawyer to represent you for your appeal. You may use *Request for Court-Appointed Lawyer in Misdemeanor Appeal* (form CR-133) to ask the court to appoint a lawyer to represent you on appeal in a misdemeanor case. You can get form CR-133 at any courthouse or county law library or online at www.courts.ca.gov/forms.

If you want a lawyer and you are not indigent or if the court turns down your request to appoint a lawyer, you

must hire a lawyer at your own expense. You can get information about finding a lawyer on the California Courts Online Self-Help Center at www.courts.ca.gov/selfhelp.htm at the “Getting Started” tab.

6 Who can appeal?

Only a party in the trial court case can appeal a decision in that case. You may not appeal on behalf of a friend, a spouse, a child, or another relative.

The party that is appealing is called the APPELLANT; in a misdemeanor case, this is usually the party convicted of committing the misdemeanor. The other party is called the RESPONDENT; in a misdemeanor case, this is usually the government agency that filed the criminal charges (on court papers, this party is called the People of the State of California). In some cases, the government agency is the appellant and the party against whom the charges were filed is the respondent.

7 Can I appeal any decision that the trial court made?

No. Generally, you may appeal only the final judgment—the decision at the end that decides the whole case. The final judgment includes the punishment that the court imposed. With the exception listed below, rulings made by the trial court before final judgment generally cannot be separately appealed, but can be reviewed only later as part of an appeal of the final judgment. In a misdemeanor case, the party convicted of committing a misdemeanor usually appeals that conviction or the sentence (punishment) ordered by the trial court. In a misdemeanor case, a party can also appeal:

- Before the trial court issues a final judgment in the case, from an order granting or denying a motion to suppress evidence (Penal Code section 1538.5(j))
- From an order made by the trial court after judgment that affects a substantial right of the appellant (Penal Code section 1466(2)(B))

You can get a copy of these laws at <http://leginfo.legislature.ca.gov/faces/codes.xhtml>.

8 How do I start my appeal?



First, you must file a notice of appeal. The notice of appeal tells the other party in the case and the trial court that you are appealing the trial court's decision. You may use *Notice of Appeal (Misdemeanor)* (form CR-132) to prepare and file a notice of appeal in a misdemeanor case. You can get form CR-132 at any courthouse or county law library or online at www.courts.ca.gov/forms.

9 Is there a deadline for filing my notice of appeal?

Yes. Except in the very limited circumstances listed in rule 8.853(b), in a misdemeanor case, you must file your notice of appeal within **30 days** after the trial court makes ("renders") its final judgment in your case or issues the order you are appealing. (You can get a copy of rule 8.853 at any courthouse or county law library or online at www.courts.ca.gov/rules). The date the trial court makes its judgment is normally the date the trial court issues its order saying what your punishment is (sentences you). **This deadline for filing the notice of appeal cannot be extended. If your notice of appeal is late, the appellate division will not be able to consider your appeal.**

10 How do I file my notice of appeal?

To file the notice of appeal in a misdemeanor case, you must bring or mail the original notice of appeal to the clerk of the trial court that made the judgment or issued the order you are appealing. It is a good idea to bring or mail an extra copy to the clerk and ask the clerk to stamp it to show that the original has been filed.

There is no fee for filing the notice of appeal in a misdemeanor case. You can ask the clerk of that court if there are any other requirements for filing your notice of appeal.

After you file your notice of appeal, the clerk will send a copy of your notice of appeal to the office of the prosecuting attorney (for example, the district attorney, county counsel, city attorney, or state Attorney General).

11 If I file a notice of appeal, do I still have to go to jail or complete other parts of my punishment?

Filing the notice of appeal does NOT automatically postpone your punishment, such as serving time in jail, paying fines, or probation conditions.

If you have been sentenced to jail in a misdemeanor case, you have a right to be released either with or without bail while your appeal is waiting to be decided, but you must ask the court to set bail or release you. If the trial court has not set bail or released you after your notice of appeal has been filed, you must ask the trial court to set bail or release you. If the trial court denies your release or sets the bail amount higher than you think it should be, you can apply to the appellate division for release or for lower bail.

Other parts of your punishment, such as fines or probation conditions, will be postponed ("stayed") only if you request a stay and the court grants your request. If you want a stay, you must first ask the trial court for a stay. You can also apply to the appellate division for a stay, but you must show in your application to the appellate division that you first asked the trial court for a stay and that the trial court unjustifiably denied your request. If you do not get a stay and you do not pay your fine or complete another part of your punishment by the date ordered by the court, a warrant may be issued for your arrest or a civil collections process may be started against you, which could result in a civil penalty being added to your fine.

12 What do I need to do after I file my appeal?

You must tell the trial court (1) whether you have agreed with the respondent ("stipulated") that you do not need parts of the normal record on appeal, and (2) whether you want a record of what was said in the trial court (this is called a record of the "oral proceedings") sent to the appellate division and, if so, what form of that record you want to use. You may use *Notice Regarding Record on Appeal (Misdemeanor)* (form CR-134) for this notice. (You can get form CR-134 at any courthouse or county law library or online at www.courts.ca.gov/forms). You must file this notice either:

- Within 20 days after you file your notice of appeal; or, if it is later,



- Within 10 days after the court decides whether to appoint a lawyer to represent you (if you ask the court to appoint a lawyer within 20 days after you file your notice of appeal).

13 In what cases does the appellate division need a record of what was said in the trial court?

You do not *have* to send the appellate division a record of what was said in the trial court. But if you want to raise any issue in your appeal that would require the appellate division to consider what was said in the trial court, the appellate division will need a record of these oral proceedings. For example, if you are claiming that there was not substantial evidence supporting the judgment, order, or other decision you are appealing, the appellate division will need a record of the oral proceedings. Since the appellate division judges were not there for the proceedings in the trial court, an official record of these oral proceedings must be prepared and sent to the appellate division for its review.

Depending on what form of the record you choose to use, you will be responsible for paying to have the official record of the oral proceedings prepared (unless you are indigent) or for preparing an initial draft of this record yourself. If you do not take care of these responsibilities, a record of the oral proceedings in the trial court will not be prepared and sent to the appellate division. If the appellate division does not receive this record, it will not be able to consider what was said in the trial court in deciding whether a legal error was made and it may dismiss your appeal.

14 What are the different forms of the record?

There are three ways a record of the oral proceedings in the trial court can be prepared and provided to the appellate division in a misdemeanor case:

- a. If a court reporter was there during the trial court proceedings, the reporter can prepare a record called a “*reporter’s transcript*.”
- b. If the proceedings were officially electronically recorded, the trial court can have a transcript

prepared from that recording; or if the court has a local rule permitting this and you and the respondent (the prosecuting agency) agree (“stipulate”) to this, you can use the *official electronic recording* itself as the record, instead of a transcript.

- c. You can use a *statement on appeal*.

Read below for more information about these options.

a. Reporter’s transcript

When available: In some misdemeanor cases, a court reporter is there in the trial court and makes a record of the oral proceedings. If a court reporter made a record of your case, you can ask to have the court reporter prepare a transcript of those oral proceedings, called a “reporter’s transcript.” You should check with the trial court to see if a court reporter made a record of your case before you choose this option. Some courts also have local rules that establish procedures for deciding whether a statement on appeal or a transcript of only some of the oral proceedings will be a good enough record to consider the issues you are raising on appeal. You should check whether the court has such a local rule.

Cost: Ordinarily, the appellant must pay for preparing a reporter’s transcript. The court reporter will provide the clerk of the trial court with an estimate of the cost of preparing the transcript and the clerk will notify you of this estimate. If you want the reporter to prepare a transcript, you must deposit this estimated amount or one of the substitutes allowed under rule 8.866 with the clerk within 10 days after the clerk sends you the estimate. However, under rule 8.866 you can decide to use a different form of the record or take other action instead of proceeding with a reporter’s transcript.

If, however, you are indigent (you cannot afford to pay the cost of a reporter’s transcript), you may be able to get a free transcript. If you were represented by the public defender or another court-appointed lawyer in the trial court, you are automatically considered indigent. If you were not represented by a court-appointed lawyer in the trial court, you can complete and file *Defendant’s*



Financial Statement on Eligibility for Appointment of Counsel and Reimbursement and Record on Appeal at Public Expense (form CR-105), to show that you are indigent. You can get form CR-105 at any courthouse or county law library or online at www.courts.ca.gov/forms. The court will review this form to decide whether you are indigent.

If the court finds that you are indigent, a court reporter made a record of your case, and you show that you need a transcript, the court must provide you with a free transcript. Whether you need a transcript depends on the issues you are raising on appeal. If the issues you are raising on appeal include that there was not substantial evidence supporting the judgment, order, or other decision you are appealing or that there was misconduct in your case that harmed you, that is generally enough to show that you need a transcript. If you ask for a reporter's transcript, the court may ask you what issues you are raising on appeal and may decide that a statement on appeal or a transcript of only some of the oral proceedings will be a good enough record to consider the issues you are raising.

If the court finds that you are not indigent, it will send you a notice and you will have a chance to pick another form of the record or take other actions listed in rule 8.866.

Completion and delivery: Once you deposit the estimated cost of the transcript or one of the substitutes allowed under rule 8.866 or show the court you are indigent and need a transcript, the clerk will notify the reporter to prepare the transcript. When the reporter completes the transcript, the clerk will send the reporter's transcript to the appellate division along with the clerk's transcript.

b. Official electronic recording or transcript from an official recording

When available: In some misdemeanor cases, the trial court proceedings are officially recorded on approved electronic recording equipment. If your case was officially recorded, you can ask to have a transcript prepared from that official electronic recording. You should check with the trial court to

see if your case was officially electronically recorded before you choose this option. As with reporter's transcripts, some courts also have local rules that establish procedures for deciding whether a statement on appeal or a transcript of only some of the oral proceedings will be a good enough record to consider the issues you are raising on appeal. You should check whether the court has such a local rule.

If the court has a local rule for the appellate division permitting this and all the parties agree ("stipulate"), a copy of the official electronic recording itself can be used as the record of the oral proceedings instead of preparing a transcript. You should check with the trial court to see if your case was officially electronically recorded and check to make sure there is a local rule permitting the use of the recording itself before choosing this option. If you choose this option, you must attach a copy of your agreement with the other parties (called a "stipulation") to your notice regarding the oral proceedings.

Cost: Ordinarily, the appellant must pay for preparing a transcript or making a copy of the official electronic recording. The court will send you an estimate of the cost for this transcript or the copy of the electronic recording. If you still want this transcript or recording, you must deposit this amount with the court. However, you can also choose to use a statement on appeal instead, or take one of the other actions listed in rule 8.868.

If, however, you are indigent (you cannot afford to pay the cost of the transcript or recording), you may be able to get a free transcript or recording. If you were represented by the public defender or another court-appointed attorney in the trial court, you are automatically considered indigent. If you were not represented by a court-appointed lawyer in the trial court, you can complete and file *Defendant's Financial Statement on Eligibility for Appointment of Counsel and Reimbursement and Record on Appeal at Public Expense* (form CR-105) to show that you are indigent. You can get form CR-105 at any courthouse or county law library or online at www.courts.ca.gov/forms. The court will review this form to decide whether you are indigent.



If you are indigent, an official electronic recording of your case was made, and you show that you need a transcript, the court must provide you with a free transcript. As with reporter's transcripts, whether you need a transcript depends on the issues you are raising on appeal. If the issues you are raising on appeal include that there was not substantial evidence supporting the judgment, order, or other decision you are appealing or that there was misconduct in your case that harmed you, that is generally enough to show that you need a transcript. If you ask for a transcript, the court may ask you what issues you are raising on appeal and may decide that a statement on appeal or a transcript of only some of the oral proceedings will be a good enough record to consider the issues you are raising.

If the court finds that you are not indigent, it will send you a notice and you will have a chance to use a statement on appeal instead or take one of the other actions listed in rule 8.868.

Completion and delivery: Once you deposit the estimated cost of the transcript or the official electronic recording with the clerk or show the court you are indigent and need a transcript, the clerk will have the transcript or copy of the recording prepared. When the transcript is completed or the copy of the official electronic recording is prepared, the clerk will send the transcript or recording to the appellate division along with the clerk's transcript.

c. Statement on appeal

Description: A statement on appeal is a summary of the trial court proceedings approved by the trial court judge who conducted those proceedings (the term "judge" includes commissioners and temporary judges).

When available: If the trial court proceedings were not recorded either by a court reporter or by official electronic recording equipment, or if you do not want to use either of these forms of the record, you can choose ("elect") to use a statement on appeal as the record of the oral proceedings in

the trial court (please note that it may take more of your time to prepare a statement on appeal than to use either a reporter's transcript or electronic recording, if they are available).

Contents: A statement on appeal must include:

- A statement of the points you (the appellant) are raising on appeal;
- A summary of the trial court's rulings and judgment; and
- A summary of the testimony of each witness and other evidence that is relevant to the issues you are raising on appeal.

(See rule 8.869 of the California Rules of Court for more information about what must be included in a statement on appeal and the procedures for preparing a statement. You can get this rule at any courthouse or county law library or online at www.courts.ca.gov/rules.htm.)

Preparing a proposed statement: If you choose to use a statement on appeal, you must prepare a proposed statement. If you are not represented by a lawyer, you must use *Proposed Statement on Appeal (Misdemeanor)* (form CR-135) to prepare your proposed statement. You can get form CR-135 at any courthouse or county law library or online at www.courts.ca.gov/forms.

Serving and filing a proposed statement: You must serve and file your proposed statement in the trial court within 20 days after you file your notice regarding the record of the oral proceedings. "Serve and file" means that you must:

- Have somebody over 18 years old who is not a party to the case—so not you—mail or deliver ("serve") a copy of the proposed statement to the prosecuting attorney and any other party in the way required by law.
- Make a record that the proposed statement has been served. This record is called a "proof of service." *Proof of Service (Appellate Division)* (form APP-109) can be used to make this record. The proof of service must show who



served the proposed statement, who was served with the proposed statement, how the proposed statement was served (by mail or in person), and the date the proposed statement was served.

- File the original proposed statement and the proof of service with the trial court. You should make a copy of the proposed statement you are planning to file for your own records before you file it with the court. It is a good idea to bring or mail an extra copy of the proposed statement to the clerk when you file your original and ask the clerk to stamp this copy to show that the original has been filed.

You can get more information about how to serve court papers and proof of service from *What Is Proof of Service?* (form APP-109-INFO) and on the California Courts Online Self-Help Center at www.courts.ca.gov/selfhelp-serving.htm.

Review and modifications: The prosecuting attorney and any other party have 10 days from the date you serve your proposed statement to serve and file proposed changes (called “amendments”) to this statement. The trial court judge then reviews both your proposed statement and any proposed amendments filed by the prosecuting attorney and any other party. The judge will then make or order you to make any corrections or modifications to the statement needed to make sure that the statement provides a complete and accurate summary of the relevant testimony and other evidence.

Completion and certification: If the judge makes or orders you to make any corrections or modifications to the proposed statement, the corrected or modified statement will be sent to you, the prosecuting attorney, and any other party for your review. If you disagree with anything in the judge’s statement, you will have 10 days from the date the statement is sent you to serve and file objections to the statement. The judge then reviews any objections, makes any additional corrections to the statement, and certifies the statement as a complete and accurate summary of the relevant testimony and other evidence.

Sending the statement to appellate division: Once the trial court judge certifies the statement on appeal, the trial court clerk will send the statement to the appellate division along with the clerk’s transcript.

15 Is there any other part of the record that needs to be sent to the appellate division?

Yes. There are two other parts of the official record that need to be sent to the appellate division:

- **Documents filed in the trial court:** The trial court clerk is responsible for preparing a record of the written documents filed in your case, called a “clerk’s transcript,” and sending this to the appellate division. (The documents the clerk must include in this transcript are listed in rule 8.861 of the California Rules of Court. You can get a copy of this rule at any courthouse or county law library or online at www.courts.ca.gov/rules.htm.)
- **Exhibits submitted during trial:** Exhibits, such as photographs, that were admitted in evidence, refused, or lodged (temporarily placed with the court) in the trial court are considered part of the record on appeal. If you want the appellate division to consider such an exhibit, however, you must ask the trial court clerk to send the original exhibit to the appellate division within 10 days after the last respondent’s brief is filed in the appellate division. (See rule 8.870 of the California Rules of Court for more information about this procedure. You can get a copy of this rule at any courthouse or county law library or online at www.courts.ca.gov/rules.htm.) Sometimes, the trial court returns an exhibit to a party at the end of the trial. If the trial court returned an exhibit to you or another party and you or the other party ask for the exhibit to be sent to the appellate division, the party who has the exhibit must deliver that exhibit to the appellate division as soon as possible.



16 What happens after the record is prepared?

As soon as the record of the oral proceeding is ready, the clerk of the trial court will send it to the appellate division along with the clerk's transcript. When the appellate division receives this record, it will send you a notice telling you when you must file your brief in the appellate division.

17 What is a brief?

A brief is a party's written description of the facts in the case, the law that applies, and the party's argument about the issues being appealed. If you are represented by a lawyer in your appeal, your lawyer will prepare your brief. If the appellate division has permitted you to represent yourself, you will have to prepare your brief yourself. You should read rules 8.880–8.891 of the California Rules of Court, which set out the requirements for preparing, serving, and filing briefs in misdemeanor appeals, including requirements for the format and length of those briefs. You can get copies of these rules at any courthouse or county law library or online at www.courts.ca.gov/rules.htm.

Contents: If you are the appellant (the party who is appealing), your brief, called the "appellant's opening brief," must clearly explain what you believe are the legal errors made in the trial court. Your brief must refer to the exact places in the clerk's transcript and the reporter's transcript (or other record of the oral proceedings) that support your argument. Remember that an appeal is not a new trial. The appellate division will not consider new evidence, such as the testimony of new witnesses or new exhibits, so do not include any new evidence in your brief.

Serving and filing: You must serve and file your brief in the appellate division by the deadline the court set in the notice it sent you, which is usually 30 days after the record is filed in the appellate division. "Serve and file" means that you must:

- Have somebody over 18 years old who is not a party to the case—so not you—mail or deliver ("serve") the brief to the respondent (the prosecuting agency) and any other party in the way required by law.

- Make a record that the brief has been served. This record is called a "proof of service." *Proof of Service (Appellate Division)* (form APP-109) can be used to make this record. The proof of service must show who served the brief, who was served with the brief, how the brief was served (by mail or in person), and the date the brief was served.
- File the original brief and the proof of service with the appellate division. You should make a copy of the brief you are planning to file for your own records before you file it with the court. It is a good idea to bring or mail an extra copy of the brief to the clerk when you file your original and ask the clerk to stamp this copy to show that the original has been filed.

You can get more information about how to serve court papers and proof of service from *What Is Proof of Service?* (form APP-109-INFO) and at www.courts.ca.gov/selfhelp-serving.htm.

If you do not file your brief by the deadline set by the appellate division, the court may dismiss your appeal.

18 What happens after I file my brief?

Within 30 days after you serve and file your brief, the respondent (the prosecuting agency) may, but is not required to, respond by serving and filing a respondent's brief. If the respondent does not file a brief, the appellant does not automatically win the appeal. The court will decide the appeal on the record, the appellant's brief, and any oral argument by the appellant.

If the respondent serves and files a brief, within 20 days after the respondent's brief was served, you may, but are not required to, serve and file another brief replying to the respondent's brief. This is called a "reply brief."

19 What happens after all the briefs have been filed?

Once all the briefs have been served and filed or the time to serve and file them has passed, the court will notify you of the date for oral argument in your case unless your case presents no arguable issues for the court to



consider. If your case presents no arguable issues, the court will not hold oral argument.

20 What is oral argument?

“Oral argument” is the parties’ chance to explain their arguments to the appellate division judges in person. You do not have to participate in oral argument if you do not want to; you can notify the appellate division that you want to “waive” (give up) oral argument by serving and filing a notice within 7 days after the notice of oral argument was sent by the court. You can use *Notice of Waiver of Oral Argument (Misdemeanor)* (form CR-138) to waive oral argument.

If all parties waive oral argument, and the appellate division approves the waiver and takes the oral argument off calendar, the judges will decide your appeal based on the briefs and the record that were submitted. But if one party waives oral argument and another party or parties do not, the appellate division will hold oral argument with any party or parties who choose to participate, including any party who asked to waive oral argument.

If you choose to participate in oral argument, each party will have up to 10 minutes for argument, unless the court orders otherwise. If the appellate division has permitted you to represent yourself, remember that the judges will already have read the briefs, so you do not need to read your brief to the judges. It is more helpful to tell the judges what you think is most important in your appeal or ask the judges if they have any questions you could answer.

21 What happens after oral argument?

After the oral argument is held (or all parties waive oral argument and the court approves the waiver), the judges of the appellate division will make a decision about your appeal. The appellate division has 90 days after oral argument (or the date its waiver was approved) to decide the appeal. The clerk of the court will mail you a notice of that decision.

22 What should I do if I want to give up my appeal?

If you decide you do not want to continue with your appeal, you must file a written document with the appellate division notifying it that you are giving up (this is called “abandoning”) your appeal. You can use *Abandonment of Appeal (Misdemeanor)* (form CR-137) to file this notice in a misdemeanor case. You can get form CR-137 at any courthouse or county law library or online at www.courts.ca.gov/forms.htm.

If you decide not to continue your appeal and it is dismissed, you will (with only very rare exceptions) permanently give up the chance to raise any objections to your conviction, sentence, or other matter that you could have raised on the appeal. If you were released from custody with or without bail or your sentence or any probation conditions were stayed during the appeal, you may be required to start serving your sentence or complying with your probation conditions immediately after your appeal is dismissed.

DRAFT

03-09-20

Not approved by
the Judicial Council

Instructions

- This form is only for requesting that the court appoint a lawyer to represent a defendant in a **misdemeanor** appeal.
- Before you fill out this form, read *Information on Appeal Procedures for Misdemeanors* (form CR-131-INFO) to know your rights and responsibilities. You can get form CR-131-INFO at any courthouse or county law library or online at www.courts.ca.gov/forms.
- The court is required to appoint a lawyer to represent you if you are indigent (you cannot afford to pay for a lawyer) and:
 - You were convicted and your punishment includes going to jail or paying a fine of more than \$500 (including penalty and other assessments); or
 - You are likely to suffer other negative consequences from the conviction (for example, immigration problems or inability to get or keep a license or permit); or
 - You have not been convicted but you are likely to suffer significant harm if you lose the appeal.
- Fill out this form and make a copy of the completed form for your records.
- Take or mail the completed form to the clerk's office for the same trial court where the notice of appeal was filed. It is a good idea to take or mail an extra copy to the clerk and ask the clerk to stamp it to show that the original has been filed.

You fill in the name and street address of the court that issued the judgment or order you are appealing:

Superior Court of California, County of

You fill in the number and name of the trial court case in which you are appealing the judgment or order:

Trial Court Case Number:

Trial Court Case Name:

You fill in the appellate division case number (if you know it):

Appellate Division Case Number:

1 Your Information

- a. Name of Defendant (the party who is filing this request):

Name: _____

Street address: _____
Street City State ZipMailing address (if different): _____
Street City State Zip

Phone: _____ Email: _____

- b. Defendant's lawyer (skip this if the defendant is filling out this form):

Name: _____ State Bar number: _____

Street address: _____
Street City State ZipMailing address (if different): _____
Street City State Zip

Phone: _____ Email: _____

Fax: _____



Trial Court Case Name: _____

Trial Court Case Number: _____

Information About Your Case

- 2 Were you/was your client represented by the public defender or another court-appointed lawyer in the trial court proceedings in this case? (Check a or b.)
- a. ☐ Yes
- b. ☐ No (Complete and attach Defendant's Financial Statement on Eligibility for Appointment of Counsel and Reimbursement and Record on Appeal at Public Expense (form MC-210) showing that you/your client cannot afford to hire a lawyer. You can get form MC-210 at any courthouse or county law library or online at www.courts.ca.gov/forms.)
- 3 If you have been convicted, describe the punishment the trial court gave you/your client in this case (check all that apply and fill in any required information):
- a. ☐ Jail time
- b. ☐ A fine (including penalty and other assessments) (fill in the amount of the fine): \$ _____
- c. ☐ Restitution (fill in the amount of the restitution): \$ _____
- d. ☐ Probation (fill in the amount of time on probation): _____
- e. ☐ Other punishment (describe any other punishment that the trial court gave you/your client in this case):

- f. ☐ Describe any other negative consequences that you are/your client is likely to suffer because of this conviction:

- 4 If you have not been convicted, describe the order being challenged on appeal:

Notice to Defendant: If you were represented by appointed counsel in the trial court and the trial court finds that you are able to pay all or part of the cost of that counsel, at the conclusion of the proceedings, the court may also determine after a hearing whether you are able to pay all or a portion of the cost of any attorney appointed to represent you in this appeal. If the court determines that you are at that time able to pay, the court will order you to pay all or part of such cost. Such orders will have the same force and effect as a judgment in a civil action and will be subject to enforcement.

Date: _____

Type or print name

Signature of defendant or attorney

W20-01

Appellate Procedure: Appointment of Counsel in Misdemeanor Appeals (Amend Cal. Rules of Court, rule 8.851; revise forms CR-131-INFO and CR-133)

All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	DRAFT Committee Response
1.	California Lawyers Association By Leah Spero, Chair Committee on Appellate Courts and Saul Bercovitch, Director of Governmental Affairs	A	<p>The Committee on Appellate Courts supports this proposal. The proposed amendments to Rule 8.851 sufficiently implement the ruling in <i>Gardner v. Appellate Division of Superior Court</i> (2019) 6 Cal.5th 998, by requiring the appellate division to appoint counsel for an indigent defendant facing a misdemeanor charge when an appeal is taken by either party before judgment, if the appeal arises from a “critical stage” of the criminal proceedings.</p> <p>The Request for Specific Comment asks whether subdivision (a)(2) of the rule should be amended to specifically authorize the appellate division to appoint counsel even if the proceedings are not at a critical stage, and the Committee supports that further amendment. The Committee does not anticipate that this provision would be invoked often, and the appellate division would have the discretion to decline any unwarranted request for appointment of counsel at a non-critical stage. In the Committee’s view, the appellate division is in the best position to determine whether an individual request for counsel is unwarranted, and its discretionary authority should not be limited as a whole based on theoretical concerns that the rule could have unintended consequences.</p> <p>The Committee suggests the following amendment to Rule 8.851, subdivision (a)(2): “On application, the appellate division may</p>	<p>The committee notes the commenter’s support for the proposal.</p> <p>The committee appreciates this feedback and agrees with allowing the appellate division the discretion to make this determination.</p> <p>The committee thanks the commenter for suggesting specific language and has included this language in the proposal.</p>

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Appellate Procedure: Appointment of Counsel in Misdemeanor Appeals (Amend Cal. Rules of Court, rule 8.851; revise forms CR-131-INFO and CR-133)

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	Commenter	Position	Comment	DRAFT Committee Response
			appoint counsel for any other indigent defendant charged with or convicted of a misdemeanor.”	
2.	Jayce Hottenroth Cypress, California	NI	<p>My name is Jayce Hottenroth. I am currently a student at Oxford Academy in Cypress California, and am writing in regard to the proposals open to public comment. Specifically this email is directed towards the Appellate Procedure, and the Appointment of Counsel in Misdemeanor Appeals. The judicial system plays such an important role in the image of our nation, as well as a massive role in people’s lives, those innocent and guilty.</p> <p>The judicial system is far from perfect as all things are, and I believe such action towards the Appellate Procedure is a step in the right direction. More outlets for those who are placed on trial will not only benefit the individual, it would benefit the government as each individual prisoner requires an estimated \$31,000 dollars a year. A more open minded judicial system when it comes to those who are attempting to appeal their cases would also be beneficial. The Judicial system can make mistakes whether it be due to false forms of evidence, such as false testimony. This lack of certainty in the conviction process as well as the cost of financing a prisoner makes it all the more reasonable to hear more cases. In a nation where an immense number of individuals are convicted yearly, the introduction of such action</p>	<p>The committee notes the commenter’s support of efforts to improve the justice system and appreciates the thoughtful comments and participation in this process.</p> <p>The committee appreciates the commenter’s thoughts on the judicial system. The committee works to improve the administration of justice in appellate proceedings (see Cal. Rules of Court, rule 10.40), and welcomes feedback and suggestions for how it may best serve the interests of the public.</p>

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Appellate Procedure: Appointment of Counsel in Misdemeanor Appeals (Amend Cal. Rules of Court, rule 8.851; revise forms CR-131-INFO and CR-133)

All comments are verbatim unless indicated by an asterisk (*).

	Commenter	Position	Comment	DRAFT Committee Response
			<p>towards the Appellate procedure is a step towards the right direction.</p> <p>As humans we are imperfect which suggests faulty systems all throughout the globe, however steps such as the inclusion of such proposal to the Appellate Procedure is a major step in the right direction. Directing our judicial system in this manner will only yield positivity for our nation and I hope for further advocating for actions which may benefit all citizens equally in court. Thank you for your time in reading this email.</p>	<p>The committee thanks the commenter for taking an interest in this proposal and the time to respond.</p>
3.	Joint Rules Subcommittee (JRS) of the Trial Court Presiding Judges Advisory Committee (TCPJAC) and the Court Executives Advisory Committee (CEAC)	AM	<p>The JRS notes the following impact to court operations:</p> <ul style="list-style-type: none">• Impact on existing automated systems (e.g., case management system, accounting system, technology infrastructure or security equipment, Jury Plus/ACS, etc.)• Results in additional training, which requires the commitment of staff time and court resources.• Impact on local or statewide justice partners. <p>The JRS notes that training would not create a major impact given the straight-forward nature of the change and that the forms will be updated within the same implementation timeframe as the rule change. Changes to CMS systems may present delays given time to develop, test and implement. Costs should be within the cost for</p>	<p>The committee notes the commenter's support for the proposal if modified and appreciates the feedback regarding impact to court operations.</p> <p>The committee appreciates this information, and acknowledges the commenter's concern regarding the time for implementation.</p>

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Appellate Procedure: Appointment of Counsel in Misdemeanor Appeals (Amend Cal. Rules of Court, rule 8.851; revise forms CR-131-INFO and CR-133)

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	Commenter	Position	Comment	DRAFT Committee Response
			<p>maintenance and changes due to change in law and under the purview of the vendor.</p> <p>There will be cost impacts to the county indigent defense fund as appointments increase with this proposed change. Current contracts likely do not address this additional appointment which may lead to delayed implementation and appointment/payment challenges. Communications to Justice Partners will be vital.</p> <p>Request for Specific Comments:</p> <p>1. Does the proposal appropriately address the stated purpose?</p> <ul style="list-style-type: none">• Yes <p>2. Should subdivision (a)(2) of the rule be amended to authorize the appellate division, in its discretion, to appoint counsel for any other indigent defendant accused of a misdemeanor?</p> <ul style="list-style-type: none">• Including the term “accused” may be an expansion of the rule beyond the intent of <i>Gardner v. Appellate Division of Superior Court</i>. It is difficult to see how the appellate division will be hearing a matter that does not follow a conviction or responding to an appeal from the prosecution following a suppression motion or a motion to dismiss. This idea may have flowed from language in <i>Gardner</i> that	<p>The committee notes this feedback and appreciates the commenter’s raising these points.</p> <p>The committee thanks the commenter for responding to the request for specific comments.</p> <p>No further response required.</p> <p>The committee agrees that the situation warranting a discretionary appointment of appellate counsel for a defendant charged with a misdemeanor would be relatively rare. However, defendants may appeal under both Penal Code section 1510 and 1538.5(j). The committee concluded that amending the rule to provide the appellate division with discretion to appoint counsel if warranted is consistent with <i>Gardner</i></p>

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Appellate Procedure: Appointment of Counsel in Misdemeanor Appeals (Amend Cal. Rules of Court, rule 8.851; revise forms CR-131-INFO and CR-133)

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	Commenter	Position	Comment	DRAFT Committee Response
			<p>identified a right to counsel during pre-indictment lineups, citing <i>Bustamante</i>. The appellate department would not appoint counsel until there was some trial court decision to appeal.</p> <p>3. Should the committee consider developing a separate rule regarding appointment of counsel in writ proceedings in the appellate division?</p> <ul style="list-style-type: none">• Yes. Suggest amending Rule 8.931 and the APP-151 form to include a right to counsel in misdemeanor writ proceedings. <p>4. Would the proposal provide a cost savings? If so, please quantify.</p> <ul style="list-style-type: none">• No. However, there may be a time-saving advantage to the court to have attorneys, rather than self-represented litigants, file and process the misdemeanor appeals. The clerks often spend a great deal of time working with self-represented litigants when processing appeals, and documents are routinely returned multiple times due to errors. <p>5. What would the implementation requirements be for courts - for example, training staff, revising processes and procedures, changing docket codes in case management systems, or modifying case management systems?</p>	<p>and could improve access to justice if the situation did arise.</p> <p>The committee appreciates this feedback and specific suggestion for a future proposal.</p> <p>The committee appreciates this feedback.</p>

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Appellate Procedure: Appointment of Counsel in Misdemeanor Appeals (Amend Cal. Rules of Court, rule 8.851; revise forms CR-131-INFO and CR-133)

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	Commenter	Position	Comment	DRAFT Committee Response
			<ul style="list-style-type: none">• Training on forms changes and minute order entries would likely be minimal in time and cost and would likely be part of meetings or updates incorporating other law or procedural changes. Cost would be negligible. The change may or may not include a required change to the CMS system, but costs would likely be covered by ongoing maintenance by vendor which includes revisions required due to change in law. <p>6. Would three months for Judicial Council approval of this proposal until its effective date provide sufficient time for implementation?</p> <ul style="list-style-type: none">• Changes to CMS systems routinely take time to develop, test and implement. Six months would be a necessary minimum although courts with manual processes could begin within the three-month time period. An effective date of January 1, 2021 should provide sufficient time for implementation. <p>7. How well would this proposal work in courts of different sizes?</p> <ul style="list-style-type: none">• Resultant procedures will vary depending on automation maturity of each court and there will be a larger impact on public defenders in larger courts which may increase delays in case flow. <p>Other Comments:</p>	<p>The committee thanks the commenter for this information on implementation requirements for courts.</p> <p>The committee notes the commenter's recommendation that the amended rule and revised forms take effect on January 1, 2021 rather than September 1, 2020. However, it is important that they take effect as soon as possible. The current version of the rule is incorrect and the forms are incomplete.</p> <p>The committee appreciates this insight.</p>

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Appellate Procedure: Appointment of Counsel in Misdemeanor Appeals (Amend Cal. Rules of Court, rule 8.851; revise forms CR-131-INFO and CR-133)

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	Commenter	Position	Comment	DRAFT Committee Response
			<p>In looking at the language proposed in rule 8.551(1) (B), consider using the language in the proposed CR-133 form: The appeal is before a final judgment, and the defendant is likely to suffer significant harm if the defendant loses the appeal.</p> <p>Also, it would seem consistent that an appeal of a pre-conviction ruling would also be limited by the same penalty provision in 8.551(a)(1)(A), i.e., when the conviction would subject the defendant to incarceration, fine of more than \$500, or likely result in significant collateral consequences.</p> <p>This language would cover all of the situations raised in <i>Gardner</i> and would also cover pre-final judgment writ proceedings. The judgment is final when the time to appeal any proceeding within the case has lapsed, or when all appellate remedies have been exhausted. This would also apply to retroactivity issues when new statutes are enacted, and conviction is not final (i.e., suspended sentence). (See, for example, <i>People v. McKenzie</i> (2018) 25 Cal.App.5th 1207.)</p> <p>Right to self-representation.</p> <p>There is a suggestion on the bottom of page two that item 4 of the CR-131 INFO form be modified to clarify that a defendant does not have a right of self-representation and to add language advising a defendant whose request</p>	<p>The committee appreciates this suggestion. In drafting the amendments for rule 8.851(a)(1), the committee sought to maintain the current structure of the rule and to use language that closely tracks <i>Gardner</i>. Since <i>Gardner</i> did not limit the appointment of counsel for a pre-conviction defendant to the same penalty provisions that apply for a defendant who has been convicted of a misdemeanor, the committee did not include that language.</p> <p>The committee will consider developing a rule for appointment of counsel in misdemeanor writ proceedings.</p> <p>The point about retroactivity issues and a judgment that is not final is an interesting one. The committee has removed reference to final judgment from the forms and would welcome further input if there are any ambiguities in the language.</p>

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Appellate Procedure: Appointment of Counsel in Misdemeanor Appeals (Amend Cal. Rules of Court, rule 8.851; revise forms CR-131-INFO and CR-133)

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	Commenter	Position	Comment	DRAFT Committee Response
			<p>for self-representation was denied of the need to either hire an attorney or request that an attorney be appointed.</p> <p>This raises two questions:</p> <ol style="list-style-type: none">1. Should Rule 8.851(a) (1) be amended to provide that an attorney will be appointed, rather than include the language “on application”? If there is no right to self-representation for an appeal, then why is an application necessary?2. Does the limitation on the right to self-representation apply to all types of appeal, including the appeal at issue in <i>Gardner</i> that was an appeal that occurred prior to a conviction? <p>The California Supreme Court, <i>In Re Barnett</i> (2003) 31 Cal.4th 466, a capital case, held that a criminal defendant’s rights regarding legal representation are more limited on appeal than at trial. This is because the Sixth Amendment does not include a right to appeal. California has conferred a right to appeal in a criminal case. The court held that “Notably, however, there is no right—constitutional, statutory, or otherwise—to self-representation in a criminal appeal in California.” As the United States Supreme Court recently explained [<i>Martinez v. Court of Appeal</i> (2000) 528 US 152] , the sole constitutional right to self-representation derives</p>	<p>An application is required in order for the court to determine whether the defendant is requesting appointed counsel and entitled to appointed counsel.</p> <p>The committee’s understanding of the case law is that a misdemeanor defendant has no right of self-representation on appeal, including a pre-conviction appeal.</p>

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			<p>from the Sixth Amendment, which pertains strictly to the basic rights that an accused enjoys in defending against a criminal prosecution and does not extend beyond the point of conviction.</p> <p>Emphasizing that the change in one's position from “defendant” to “appellant” is a significant one, the high court found that the balance between a criminal defendant's interest in acting as his or her own lawyer and a state's interest in ensuring the fair and efficient administration of justice “surely tips in favor of the [s]tate” once the defendant is no longer presumed innocent but found guilty beyond a reasonable doubt. Consequently, the court concluded, states may exercise broad discretion when considering what representation to allow and may require an indigent inmate “to accept against his will a state-appointed attorney” for representation on a direct appeal without violating the federal Constitution. (emphasis added.)</p> <p><i>People v Johnson</i> (2012) 53 Cal.4th 519 held “California law is subject to the United States Constitution, including the Sixth Amendment right to self-representation as established in <i>Faretta</i>. Thus, a criminal defendant's right of self-representation in California is rooted in the federal constitution only, and a court in California may deny self-representation to the extent permitted by <i>Faretta</i> and its progeny. (<i>Johnson</i>, at p. 528.)</p>	

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			<p>Opposing an appeal from the People following a successful suppression motion occurs prior to conviction (the person remains a defendant and not an appellant) and appears to fall within the scope of “defending against a criminal prosecution.”</p> <p>If a self-represented litigant can argue a suppression motion, then it is not clear why they would not have the right to represent themselves in an appeal from a ruling on that motion by the People.</p>	<p>The committee appreciates the commenter’s observations. No further response required.</p>
4.	Office of the Marin County Public Defender by Jose H. Varela Public Defender	A	<p>At the Marin County Office of the Public Defender we do not have a writs and appeals attorney as do other larger counties. This proposal ensures that our misdemeanor clients, the vast majority of our clients, have equal access to appellate review.</p> <p>The changes are doable and clear.</p>	<p>The committee notes the commenter’s agreement with the proposal and appreciates the feedback.</p>
5.	Orange County Bar Association by Scott B. Garner, President Newport Beach, California	A	<p>Does the proposal appropriately address the stated purpose?</p> <p>Yes.</p> <p>Should subdivision (a)(2) of the rule be amended to authorize the appellate division, in its discretion, to appoint counsel for any other indigent defendant accused of a misdemeanor?</p> <p>Yes. Currently subdivision (a)(2) permits the discretionary appointment of counsel when a defendant has been convicted of a crime that</p>	<p>The committee notes the commenter’s agreement with the proposal and thanks the commenter for responding to specific questions.</p> <p>The committee agrees with the commenter that this subdivision should be amended, but to clarify, the amendment would <i>add</i> the category of</p>

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			<p>does not meet the criteria delineated in subdivision (a)(1). Historically, this has meant individuals who were convicted of misdemeanors not punishable by incarceration or a fine of more than \$500 or were not likely to suffer adverse collateral consequences, such as violations of Health and Safety Code section 11357(b) [possession of less than an ounce of marijuana], prior to the statute being amended by Proposition 64. Amending the subdivision by replacing “convicted” with “accused of” will presumably only impact self-represented defendants who find themselves as real party in interest when opposing counsel seeks review of pre-trial orders (primarily orders related to discovery) in the appellate division by way of extraordinary writ petitions. Gardner explains that appointment of counsel to assist in the appellate phase of a misdemeanor criminal case is required because appellate “rules are forbidding for any layperson, but all the more so for criminal defendants who come to court with a wide range of educational backgrounds and linguistic and other abilities.” (Id. at p. 1006.) The same could be said of extraordinary writs.</p> <p>Should the committee consider developing a separate rule regarding appointment of counsel in writ proceedings in the appellate division?</p> <p>Yes, assuming the subdivision (a)(2) is changed as contemplated above. If that change</p>	<p>defendants accused of/charged with a misdemeanor to those for whom the appellate division is authorized to appoint counsel, i.e., defendants convicted of a misdemeanor, rather than replace “convicted of” with “accused of.”</p> <p>The committee notes the commenter’s support for a rule regarding appointment of counsel in misdemeanor writ proceedings.</p>

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			does not occur, there would be no authority for the appellate division appointing counsel, absent a determination that a writ is a critical stage of the proceedings.	
6.	Orange County Superior Court Civil and Appellate Division Management and Analyst Team	NI	<p>Does the proposal appropriately address the stated purpose?</p> <p>Yes, the proposal addresses the stated purpose.</p> <p>Should subdivision (a)(2) of the rule be amended to authorize the appellate division, in its discretion, to appoint counsel for any other indigent defendant accused of a misdemeanor?</p> <p>Yes, subdivision (a)(2) should be amended to read “convicted or accused of a misdemeanor”. Ensuring the appellate division has broad discretion to appoint is in the spirit of the purpose of the proposed revisions.</p> <p>Should the committee consider developing a separate rule regarding appointment of counsel in writ proceedings in the appellate division?</p> <p>Likewise, since the purpose of this revision is to remove any constraints on the appellate division’s authority and discretion to appoint, management agrees that proposing a separate rule regarding appointment of counsel in writ proceedings in the appellate division would be appropriate.</p>	<p>The committee thanks the commenter for responding to specific questions presented.</p> <p>No further response required.</p> <p>The committee agrees with the commenter, and has amended this subdivision of the rule, modifying “accused of” to “charged with.”</p> <p>The committee notes the commenter’s support for a rule regarding appointment of counsel in misdemeanor writ proceedings.</p>

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			<p>Would the proposal provide cost savings? If so, please quantify?</p> <p>Costs would increase commensurate with the increased number of appointments and appellate division hearings. However, this might be offset by a reduced number of criminal proceedings in the superior court.</p> <p>What would the implementation requirements be for courts—for example, training staff (please identify position and expected hours of training), revising processes and procedures (please describe), changing docket codes in case management systems, or modifying case management systems?</p> <p>For implementation, court operations would need to update procedures to include the revisions to form CR-133. Information would need to be provided to the Judicial Officers. Courtroom clerks and case processing staff would need training. Training materials would need to be updated and/or created. The approximate level of effort is estimated at 16 hours FTE by a Program Coordinator Specialist over approximately one month to revise procedures, approve through workflow, train staff and implement.</p>	<p>The committee appreciates this feedback.</p> <p>The committee thanks the commenter for this input regarding specific implementation requirements.</p>
7.	San Diego County Bar Association Appellate Practice Section by Helen Irza, Chair	AM	The Appellate Practice Section of the San Diego County Bar Association shared with its membership the proposed changes to the California Rules of Court contained in	The committee notes the commenter's support for the proposal if modified.

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			<p>Invitation to Comment W20-01. After canvassing its membership and forming a subcommittee to discuss them, our section has the following comments about the proposal:</p> <p>General Comments</p> <p>The Invitation to Comment requested comments on these general topics.</p> <p>1. Does the proposal appropriately address the stated purpose?</p> <p>The Executive Summary of the Invitation to Comment states the purpose of the proposed rule change and form change is to implement the California Supreme Court's decision in <i>Gardner v. Appellate Division of Superior Court</i> (2019) 6 Cal.5th 998 by expanding the circumstances under which the superior court appellate division in misdemeanor appeals must appoint counsel for an indigent defendant. Our section agrees that the proposal as a whole appropriately gives flexibility for the appellate division to appoint counsel for indigent defendants in misdemeanor appeals at critical stages of a criminal proceeding other than a People's pretrial appeal of the grant of a motion to suppress evidence.</p> <p>Regarding the specific changes that are proposed for the forms, we suggest adding language to the information sheet on form CR-</p>	<p>The committee notes this feedback.</p> <p>The committee appreciates the suggestion that the information sheet provide more assistance and specific examples of significant adverse</p>

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			<p>131-INFO in section 5 (“How do I get a lawyer”) to provide more directed guidance to the defense about potential adverse collateral consequences. Questions 3-f and 4 of CR-133 ask defendants to describe any significant harm they are likely to suffer because of the conviction or if they lose the appeal. Presumably, these questions relate to rule 8.851(a)(1)(A)’s language directing that defendants be appointed counsel if they are “likely to suffer significant adverse collateral consequences as a result of the conviction.” Based on experience, our members believe that absent a concrete list of specific examples of potential adverse collateral consequences, defendants will not tailor their responses in questions 3-f and 4 of CR-133 appropriately and will give generic or unhelpful responses that the vast majority of criminal defendants would otherwise state (e.g., if they are not appointed counsel they may lose on appeal and the risk of conviction increases). The information sheet gives examples in section 7 (“Can I appeal any decision that the trial court made?”) of what types of rulings can be appealed. The Appellate Practice Section suggests section 5 of CR-131-INFO provide a nonexhaustive list of examples of adverse collateral consequences that may follow a conviction that would correspond to the significant harm that is referenced in questions 3-f and 4 of CR-133. For example, such harm could include, but not be limited to, immigration consequences, professional or vocational</p>	<p>collateral consequences to assist the defense in answering questions on the request for counsel form. The committee agrees and has revised language on both forms.</p>

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			<p>licensing consequences, or student loan eligibility.</p> <p>2. Should subdivision (a)(2) of the rule be amended to authorize the appellate division, in its discretion, to appoint counsel for any other indigent defendant accused of a misdemeanor</p> <p>No comment.</p> <p>3. Should the committee consider developing a separate rule regarding appointment of counsel in writ proceedings in the appellate division</p> <p>Our section supports developing a separate rule to address the appointment of counsel in writ proceedings in the appellate division. In general, the rules distinguish between direct appeals and writ proceedings. (Compare Cal. Rules of Court, rules 8.252, 8.366 with rules 8.368, 8.384.) Without a rule addressing appointment of counsel in misdemeanor writ proceedings, defendants in such proceedings may be confused as to whether they can or should rely on the rules that relate to appointment of counsel in appeals. Clarity would be helpful.</p>	<p>No response required.</p> <p>The committee appreciates the feedback on this question and will consider developing a rule for appointment of counsel in writ proceedings in a future rules cycle.</p>
8.	Superior Court of San Diego County by Mike Roddy Executive Officer	A	No specific comments provided.	The committee notes the commenter's support for the proposal and appreciates the response.